

“Annotated” USSG § 2K2.1 & Commentary

(Annotations are in Monotype Corsiva Font and correspond to bold-faced portions of the guideline)

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USSG § 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

Introduction: The very first step in applying this guideline is to accurately determine the base offense level; this depends on three main factors: (1) whether the defendant is a “prohibited person” as defined in the guideline (e.g., a felon or illegal alien); (2) the extent of the defendant’s criminal record (and whether it involves any prior convictions for a “crime of violence” or drug-trafficking offense); and (3) the type of firearm(s) at issue. The base offense level for a defendant who is not a “prohibited person” and who only possessed or engaged in a prohibited transaction regarding an “ordinary” firearm is either 6 or 12. If the defendant was either a “prohibited person” or illegally transferred a firearm to a “prohibited person,” then the base offense level is at least 14. If the defendant possessed a firearm described in the National Firearms Act (NFA), 26 U.S.C. § 5845(a) (e.g., a machinegun or sawed-off shotgun), then the base offense level is at least 18. If the defendant has one prior conviction for a “crime of violence” or a drug-trafficking offense, then the base offense level is at least 20, and if he has two (or more) such prior convictions, then the base offense level is 24. If the defendant was both a “prohibited person” and possessed an NFA weapon or a “semiautomatic firearm that is capable of accepting a large capacity magazine,” then his base offense level is at least 20 and could be either 22 or 26 depending on whether the defendant has one or two (or more) prior convictions for a “crime of violence” or a drug-trafficking offense.

(1) 26, if (A) the offense involved a (i) **semiautomatic firearm that is capable of accepting a large capacity magazine**; or (ii) **firearm that is described in 26 U.S.C. § 5845(a)**; and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a **crime of violence or a controlled substance offense**;

1. A “semiautomatic firearm capable of accepting a large capacity magazine” means “a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.” USSG § 2K2.1, comment. (n.2).

Note that this enhancement with this definition applies only to offenses committed on or after November 1, 2006, the effective date of the 2006 version of this guideline. Under prior versions of this guideline, an enhancement applied for possession of a semi-automatic assault weapon, which was formerly defined under 18 U.S.C. §

921(A)(30). That statute, however, contained a “sunset” clause repealing itself on September 13, 2004. Thus, all of the relevant legislation has been repealed, including the definition section, 18 U.S.C. § 921(a)(30), the assault weapon and high capacity magazine prohibitions, 18 U.S.C. §§ 922(v) and (w), and the enhancement for using an assault weapon in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(B)(i). Pub.L. No. 103-332, 108 Stat. 1796 § 110105. The provisions are now a nullity. Thus, for offenses committed on September 13, 2004, through October 31, 2006, there should be no enhancement for possession of any type of semi-automatic assault weapon.

For offenses committed before September 13, 2004, the adjustment in the former version of the guideline may or may not apply. If the assault weapon in question was never legally possessed at any time (i.e., was not possessed legally before the 1994 legislation banning assault weapons) and was possessed while the statutory prohibition was still in effect, then the adjustment will apply. See *United States v. Roberts*, 442 F.3d 128, 129-30 (2d Cir. 2006); *United States v. Whitehead*, 425 F.3d 870, 871-72 (10th Cir. 2005); see also 1 U.S.C. § 109 (saving statute applies to maintain the effect of repealed statutes over pre-repeal conduct). The circuits are divided on whether “grandfathered” assault weapons that otherwise fell within the statutory definition give rise to sentencing enhancements under the former version of this guideline; “grandfathered” assault weapons were those exempt from the assault weapons ban because they lawfully existed as assault weapons when the act was passed in 1994. Compare *United States v. Vega*, 392 F.3d 1281 (11th Cir. 2004) (holding that grandfathered assault weapon could give rise to § 2K2.1(a)(5) enhancement); *United States v. O'Malley*, 332 F.3d 361 (6th Cir. 2003) (holding that grandfathered assault weapon could not give rise to § 2K2.1(a)(5) enhancement).

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2. 26 U.S.C. § 5845(a) lists the following types of NFA firearms: (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device

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3. For purposes of this guideline, a “controlled substance offense” is defined in USSG § 4B1.2(b)(the Career Offender guideline), which requires the offense to be a state or federal felony (i.e., punishable by more than a year in prison) and also requires something more than simple possession of drugs (e.g., possession with intent to distribute drugs). See *Salinas v. United States*, 547 U.S. 188 (2006) (per curiam). “Crime of violence” is defined in USSG § 4B1.2(a). It means a state or federal felony offense that either (1) has as an element the use, attempted use, or actual use of physical force against the person; or (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Since this guideline was adopted, there has been a great deal of case law (including unresolved circuit splits) discussing the meaning of “controlled substance offense” and “crime of violence” under USSG § 4B1.2(b) – most involving the latter. *See, e.g., United States v. Sun Bear*, 307 F.3d 747, 752 (8th Cir. 2002) (noting circuit split over whether automobile theft constitutes a “crime of violence”; concluding that it does and disagreeing with *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (en banc)). Almost all federal courts apply the “categorical” approach of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), to determine whether a prior conviction qualifies as a predicate offense. *See, e.g., United States v. Armstead*, 467 F.3d 943, 948-49 (6th Cir. 2006). Such an approach eschews the formal label of the penal statute under which a defendant was convicted (e.g., “child abuse”) and focuses instead on the elements of the statute. *Id.* (concluding that, under the categorical approach, the defendant’s prior state conviction for attempted child abuse was not a “crime of violence” for purposes of increasing the defendant’s offense level under USSG § 2K2.1). The categorical approach has a special application to state burglary-of-a-“dwelling” offenses; a “dwelling” under the applicable state law must be a habitation or at least a building tantamount to or connected with a habitation. *See, e.g., United States v. Wenner*, 351 F.3d 696 (9th Cir. 2003) (holding that the defendant’s burglary-of-a-dwelling conviction under Washington law was not a predicate offense under USSG § 2K2.1(a)(2) because the state indictment did not specify the type of “dwelling” at issue and state law broadly defined “dwelling” to include railroad cars and cargo containers as well as traditional habitations).

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4. Note that, in determining whether a prior conviction qualifies as a predicate offense used to increase a defendant’s base offense level under USSG § 2K2.1(a), the prior conviction must fall within the time limits of, and otherwise qualify, under the “counting” rules set forth in USSG § 4A1.2. *See* USSG § 2K2.1, *commen.* (n.10). In addition, in order to be subject to enhancement for multiple prior predicate offenses, each prior conviction must be counted separately (i.e., as an “unrelated” case) under USSG § 4A1.2(a)(2) & application note 3 thereafter. *See* USSG § 2K2.1, *commen.* (n.10).

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; or (II) is convicted under

18 U.S.C. 922(d);

(5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) 14, if the defendant (A) was a **prohibited person** at the time the defendant committed the instant offense or (B) is convicted under 18 U.S.C. 922(d);

A “prohibited person” means any of the nine categories of persons listed in 18 U.S.C. § 922(g): (1) felons; (2) addicts/users of controlled substances; (3) “adjudicated mental defectives”; (4) fugitives; (5) illegal aliens or non-immigrant visa holders (e.g., student visa holders); (6) dishonorably discharged persons; (7) persons who have renounced U.S. citizenship; (8) persons subject to domestic violence restraining orders; and (9) persons convicted of misdemeanor “domestic violence” offenses. Regarding the latter category, many states’ misdemeanor assault statutes will not qualify because they do not require the intentional use of force, a necessary element under 18 U.S.C. § 921(a)(33). See, e.g., United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006) (Texas’ misdemeanor domestic assault statute, which speaks of “causing bodily injury,” is not a “crime of violence” because it does not involve the “intentional use of force”).

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(a), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

(1) If the offense involved **three or more firearms**, increase as follows:

Number of Firearms Increase in Level

(A) 3-7	add 2
(B) 8-24	add 4
(C) 25-99	add 6
(D) 100-199	add 8
(E) 200 or more	add 10.

Note that, in determining the number of firearms, a court will consider “relevant conduct” under USSG § 1B1.3. See United States v. Brummett, 355 F.3d 343 (5th Cir. 2003). Therefore, if there is proof by a preponderance of the evidence that a defendant possessed a firearm(s) other than the one charged in the indictment, and such other firearms were possessed in the same course of conduct or as part of a common scheme or plan, such firearms will be considered by a court in applying this enhancement. Note, however, that uncharged firearms may only be considered if their possession was in fact illegal. See, e.g., United States v. Campbell, 372 F.3d 1179 (10th Cir. 2004) (holding that a firearm that was not shown to have been “in or affecting commerce” under 18 U.S.C. § 922(g)

– and, thus, which was legally possessed by the defendant in that § 922(g)(1) case – could not be considered as relevant conduct in applying this enhancement).

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms **solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition**, decrease the offense level determined above to level 6.

“Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law.” USSG § 2K2.1, comment. (N.6). *Under the plain language of this provision, the mere fact that a defendant is a prohibited person does not foreclose application of this downward adjustment (e.g., a felon who illegally possesses firearms as part of a collection could still be entitled to the reduction). A defendant bears the burden of proving his entitlement to this downward adjustment; the government does not carry the burden to disprove it. United States v. Montano-Silva, 15 F.3d 52 (5th Cir. 1994). The circuits are divided over whether this downward adjustment applies when a defendant used or possessed a firearm(s) for law sporting purposes/collection and also for some other purpose as well (e.g., using a firearms collection as collateral for a loan). See, e.g., United States v. Caldwell, 431 F.3d 795, 799-800 (11th Cir. 2006) (noting the division in the circuits over whether the firearm(s) must be possessed “solely” for lawful sporting purposes or as a collection in order for the adjustment to apply).*

(3) If the offense involved--

(A) a **destructive device** that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by 15 levels; or

(B) a **destructive device** other than a destructive device referred to in subdivision (A), increase by 2 levels.

1. A “destructive device” “has the meaning given that term in 26 U.S.C. § 5845(f). See USSG § 2K2.1, comment. (n.1). That statutory definition is as follows: “The term ‘destructive device’ means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term ‘destructive device’ shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United

States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.” 26 U.S.C. § 5845(f).

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2. *This enhancement applies in addition to the base offense level increase that occurs pursuant to § 2K2.1(a) for possession of a firearm described in 26 U.S.C. § 5845(a) (which includes “destructive devices”). See USSG § 2K2.1, comment. (n.7). Thus, such “double counting” is permitted.*

(4) If any firearm (A) was **stolen**, increase by 2 levels; or (B) had an **altered or obliterated serial number**, increase by 4 levels.

A defendant need not know that the firearm was stolen or had an altered or obliterated serial number for this adjustment to apply; rather, it is a “strict liability” enhancement. See USSG § 2K2.1, comment. (n. 8(B)). Courts have upheld this provision in the face of constitutional challenges. See, e.g., United States v. Ellsworth, 456 F.3d 1146, 1150 (9th Cir. 2006). At least one court has held that this enhancement applies to serial numbers that are not discernable to the naked eye but may easily be seen with a microscope. United States v. Carter, 421 F.3d 909 (9th Cir. 2005).

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level 29, except if subsection (b)(3)(A) applies.

(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

(6) If the defendant used or possessed any firearm or ammunition **in connection with another felony offense**; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed **in connection with another felony offense**, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

Courts have broadly interpreted this upward adjustment to apply when there is a spatial and temporal “nexus” between a firearm and another felony offense. See, e.g., United States v. Condren, 18 F.3d 1190, 1195-98 (5th Cir. 1994). Such a “nexus” means that, at a minimum, the firearm had a “purpose or effect with respect to” the other felony offense because its presence facilitated or had the potential to facilitate the offense, as opposed to being the result of mere accident or coincidence. United States v. Regans, 125 F.3d 685, 686 (8th Cir. 1997). Such a nexus must be proven by a preponderance of the evidence. United States v. Fadipe, 43 F.3d 993 (5th Cir. 1995) (no nexus between bank fraud and gun found in house when defendant arrested); see also United States v. Villegas, 404 F.3d 355 (5th Cir. 2005) (no nexus between firearm and immigration fraud); United States v. Houston, 364 F.3d 243, 249 (5th Cir. 2004).

“[A]nother felony offense” for purposes of this guideline does not include firearms possession or trafficking offenses. USSG § 2K2.1, comment. (n. 14(C)). Another felony offense, however, does include a burglary in which a defendant

stole a firearm but did not otherwise use it illegally. USSG § 2K2.1, commen. (n.14(B)). Acquittal of the underlying offense does not preclude consideration of that conduct to enhance the sentence assuming it is proven by a preponderance of the evidence. United States v. Branch, 91 F.3d 699, 742 (5th Cir. 1996) (murder); but see United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) (court could depart down where slim proof of murder for which defendant was acquitted resulted in guideline sentence of life).

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition **in connection with the commission or attempted commission of another offense**, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed **in connection with another offense**, apply –

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Similar to the four-level adjustment in § 2K2.1(b)(5), courts have broadly interpreted this cross-reference, although there must be proof of an even closer “nexus” between the weapon and the other offense. United States v. Mitchell, 166 F.3d 748, 754-56 (5th Cir. 1999) (firearm which defendant possessed was not sufficiently related to drugs in house). The cross-reference may be applied for a coconspirator’s commission of a felony that was reasonably foreseeable and within the scope of the defendant’s agreement with the co-conspirator. See United States v. Tabron, 437 F.3d 63 (D.C. Cir. 2006); United States v. Phipps, 319 F.3d 177 (5th Cir. 2003).

APPLICATION NOTES:

1. Definitions.--For purposes of this guideline:

"Ammunition" has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

"Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

"Destructive device" has the meaning given that term in 26 U.S.C. § 5845(f).

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

"Firearm" has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine.-- For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. Definition of "Prohibited Person".--For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. Application of Subsection (a)(7).--Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. Application of Subsection (b)(1).--For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. Application of Subsection (b)(2).--Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1)-(a)(5), subsection (b)(2) is not applicable.

7. Destructive Devices.--A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also, §§ 5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. Application of Subsection (b)(4)

(A) Interaction with Subsection (a)(7).--If the only offense to which § 2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which § 2K2.1 applies is 18 U.S.C. 922(k) or 26 U.S.C. 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.--Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. Application of Subsection (b)(7).--Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. Prior Felony Convictions.--For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under § 4A1.1(a), (b), or (c). See § 4A1.2(a)(2); § 4A1.2, comment. (n.3).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. Upward Departure Provisions.--An upward departure may be warranted in any of the following circumstances: (1) The number of firearms substantially exceeded 200; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

12. Armed Career Criminal.--A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See § 4B1.4.

13. Application of Subsection (b)(5).--

(A) In General.--Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant--

(i) Transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) Knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual--

(I) Whose possession or receipt of the firearm would be unlawful; or

(II) Who intended to use or dispose of the firearm unlawfully.

(B) Definitions.--For purposes of this subsection:

"Individual whose possession or receipt of the firearm would be unlawful" means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. "Crime of violence" and "controlled substance offense" have the meaning given those terms in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). "Misdemeanor crime of domestic violence" has the

meaning given that term in 18 U.S.C. 921(a)(33)(A).

The term "defendant", consistent with § 1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) Upward Departure Provision.--If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) Interaction with Other Subsections.--In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

14. "In Connection With".--

(A) In General.--Subsections (b)(6) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

(B) Application When Other Offense is Burglary or Drug Offense.-- Subsections (b)(6) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(1) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.--

"Another felony offense", for purposes of subsection (b)(6), means any Federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

"Another offense", for purposes of subsection (c)(1), means any Federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.--In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

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